

FILE COPY

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF THE APPLICATION	:	
FOR A LICENSE OF	:	FINAL DECISION
	:	AND ORDER
JAMES C. MAXEY, JR.,	:	LS9107184REB
APPLICANT.	:	

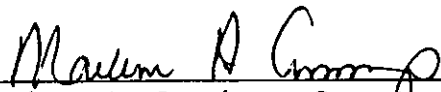
The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Department of Regulation and Licensing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 23rd day of September, 1991.



Marlene A. Cummings, Secretary
Department of Regulation and Licensing

STATE OF WISCONSIN
DEPARTMENT OF REGULATION & LICENSING

IN THE MATTER OF
THE APPLICATION FOR A LICENSE OF

Case #LS9107184REB

JAMES C. MAXEY, JR.

Applicant

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53 are:

James C. Maxey, Jr.
1401 North 67th Street
Wauwatosa, WI 53213

Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue, Room 183
P.O. Box 8935
Madison, WI 53708

A Class I hearing was conducted in the above-captioned matter on August 9, 1991, at 1400 East Washington Avenue, Madison, Wisconsin. Mr. Maxey appeared in person and without legal counsel. The department appeared by Attorney Charles J. Howden. The transcript of the proceedings was received on September 9, 1991.

Based upon the entire record in this matter, the Administrative Law Judge recommends that the Department of Regulation & Licensing adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. James C. Maxey, Jr., 1401 North 67th Street, Wauwatosa, WI 53213, applied for a license as a real estate salesperson by his application dated May 22, 1991.

2. 1985 Wisconsin Statutes section 452.09(4) states in part as follows:

(4) SALESPERSONS EDUCATIONAL PROGRAMS. Each applicant for an original salespersons license shall submit to the department proof of attendance at 45 classroom hours of educational program approved by the department. . . .

3. By 1989 Wisconsin Act 341 (1989 Assembly Bill 764), Wis. Stats. sec. 452.09(4) was repealed, and Wis. Stats. sec. 452.09(2)(a) was created to read in part as follows:

(2) EDUCATIONAL REQUIREMENTS FOR APPLICANTS FOR LICENSES.

(a) Each applicant for a salesperson's license shall submit to the department evidence satisfactory to the department of successful completion of 72 classroom hours of educational programs approved for this purpose under s. 452.05(1)(c). . . .

The effective date of the new educational requirements was May 11, 1990.

4. On April 23, 1990, department Secretary Marlene A. Cummings caused a memorandum to be submitted to real estate schools and other interested persons on the subject "Education and Examination Provisions in New Law, AB 764." The following information was provided on the subject of the new education requirements:

EDUCATION REQUIREMENTS ABILITY TO TAKE EXAM BEFORE COMPLETION OF HOURS

Any applicant who has taken the licensing examination for either the broker's or the salesperson's license before January 1, 1991, regardless of whether the applicant has failed both parts or just one part, will be able to continue under the old law for that specific kind of license up to and including the February examination date, February 23, 1991. The 45 and 90 hours of education will still be acceptable . . . and applicants will still be able to continue with the examination process without having completed all of the pre-license education. New requirements must be met by applicants who retake an examination on or after March, 1991 examination date.

EFFECTIVE DATE OF NEW EDUCATION AND EXAMINATION REQUIREMENT FOR NEW APPLICANTS

It is the goal of this department to require all new applicants who take a license examination for a specific kind of license for the first time after January 1, 1991 to satisfy all the new examination and education requirements. (emphasis in original)

5. The various deadlines contained in the April 23, 1990 memorandum were established by the department as an application procedure rather than through statutory enactment or administrative rulemaking.

6. On December 20, 1990, applicant completed 45 classroom hours of educational programs in real property law at Milwaukee Area Technical College. On December 19, 1990, applicant applied to take the salespersons licensing examination to be conducted in Milwaukee on January 26, 1991. The information relating to the January 1, 1991, deadline for qualifying for licensure under the previous educational requirements was contained in a document entitled "Application Folder, Wisconsin Real Estate Examinations, July 1990 - June 1991." which was provided to applicant along with his examination application.

7. Applicant was legally qualified to take the salesperson licensing examination conducted on December 15, 1990. Had he done so, he would not have been required to meet the increased educational requirements of sec. 452.09(2)(a), Stats., unless he failed to pass the examination before the March, 1991, examination date.

8. Applicant was successful on the January 26, 1991, licensing examination, achieving scores of 87 on the national portion and 92 on the state portion.

9. The reason that applicant missed the January 1, 1991, deadline for qualifying for licensure under the previous 45 hour educational requirement was that Eugene Ouchie, his instructor at Milwaukee Area Technical College, and general counsel for Chicago Title Insurance Company, Waukesha, specifically notified applicant and his other students that they would be grandfathered in under the old requirements if they sat for the examination in January or February, 1991.

10. Section B of the application submitted by applicant on May 22, 1991, provided the following instructions and information to the applicant:

Enclose proof of completion of the required pre-licensing real estate education in the form of a certificate issued by your school certifying completion of the 72-hour educational program in real property law, appraising, financing and marketing (persons who wrote the exam for the first time in 1990 and passed in January or February, 1991, submit certificate of completion of 45-hour course in real property law). . . .

Applicant submitted proof of completion of 45 hours of educational programs in real estate law with his application.

CONCLUSIONS OF LAW

1. The Department of Regulation & Licensing has jurisdiction in this matter pursuant to Wis. Stats. sec. 452.05.

2. The January 1, 1991, deadline for qualifying for licensure by meeting the previous 45 hour educational requirement was established by the department as a matter of application procedure and was neither mandated by statute nor codified by rule so as to invoke the various requirements of Wis. Stats. sec. 227.10.

3 Pursuant to Wis. Stats. sec. 227.11(2)(b), The department, as the agency administering and enforcing Wis. Stats. sec. 452.09(2)(a), has authority to establish and to modify procedures to effectuate the purpose of the statute.

ORDER

NOW, THEREFORE, IT IS ORDERED that as to James C. Maxey, Jr., the department's application procedure be, and hereby is, modified to extend to January 26, 1991, the examination deadline for qualifying for licensure under the 45 classroom hour requirement of Wis. Stats. sec. 452.09(4); and that James C. Maxey, Jr., therefore be, and hereby is, granted a license to practice as a real estate salesperson in Wisconsin.

OPINION

It cannot be said that the department did not act reasonably in either the manner in which it handled the transition to the increased educational requirements established by Wis. Stats. sec. 452.09(2)(a) or in its handling of Mr. Maxey's case. As to the former, notwithstanding the legislatively established May 11, 1990, effective date, the department permitted persons to become licensed under the old requirements until January 1, 1991, or, if an applicant had taken but failed the examination prior to that date, until February 23, 1991. As to Mr. Maxey, while the department apparently felt it necessary to enforce the January 1, 1991, deadline, it did notify the applicant that licensure would be granted without further examination upon a showing that applicant had completed within one year of his successful completion of the examination the additional 27 hours of education required by the new statute. The question remains, however, why the department did not change its procedure in this rather unique situation to permit Mr. Maxey to become licensed without completion of such additional education. A number of possibilities come to mind. First, it is possible that the department may have thought that having established the grandfathering provision, it lacked the authority to change it. Certainly if the transition

provisions had been promulgated as a rule, that position would have validity, for Wis. Stats. sec. 227.10(3)(c) states that "each person affected by a rule is entitled to the same benefits and is subject to the same obligations as any other person under the same or similar circumstances." The department did not promulgate rules, however, but rather handled the transition from the old to the new requirements under the rubric of its application procedures.¹ I am aware of no legal impediment to an agency modifying its application procedures to accomodate a particular unique set of circumstances.

A second possibility is that the department may have been confident of its authority to modify its procedure in this case in recognition of the unique situation confronted by Mr. Maxey, but felt that having established the procedure, it should be applied uniformly and without exception. The problem with that approach is that the department did in fact stray from its established procedure in this case. In having failed to sit for the examination prior to January 1, 1991, the established procedure dictated that Mr. Maxey meet all the requirements of the new licensing provisions. One of those requirements is that an applicant may not sit for the licensing examination until all educational requirements have been completed (Sec. 452.09(3)(e), Stats.). In this case, however, the department ruled that Mr. Maxey's examination results will be accepted, even though he must complete 27 additional hours of education. Accordingly, the virtue of uniformity may not be deemed the basis for the department's refusal to extend the January 1 deadline for an additional 26 days.

Another possibility is that the department may consider that the public health and safety would be compromised if the applicant is permitted licensure without completion of the 72 hour educational requirement. Such a proposition is insupportable. Applicant sat for the examination for the first time on January 26, 1991, and passed with high scores. Assuming that applicant had taken the examination in December, which under the departments procedure he was entitled to do, then even if he had failed the December examination, he would have been permitted licensure with 45 hours of education if he thereafter passed the examination in January. Stated another way, it is in my opinion not possible to rationally conclude that the public

¹ Whether the procedure constituted a "statement of general policy [or an] interpretation of a statute which [an agency] specifically adopts to govern its enforcement or administration of that statute" so as to require promulgation of a rule under Wis. Stats. sec. 227.10(1) is a different question, and one which -- fortunately -- need not be addressed here.

health and safety is jeopardized by licensing an individual who received 45 hours of education and who passed the examination the first time he took it in January, 1991, if it is not jeopardized by licensing an applicant who received the same education at the same time, who failed the examination in December, 1990, and who finally passed it in January or February, 1991.

Finally, the department may have considered the equities of the matter to militate against making an exception in this case. An argument based on that premise would state that even though the applicant was admittedly misled by his instructor as to the grandfathering provision, and even though attendees of schools approved by the department should be entitled to rely on information provided by approved instructors,² applicant had adequate notice of the transition provisions, and it is therefore reasonable and proper for the department to require that the applicant comply with those provisions.

It is true that the examination application materials received by Mr. Maxey and submitted by him on December 19, 1991, contained the correct information on the transition requirements. Applicant credibly testified, however, that he had no reason to examine those materials until after administration of the last examination prior to the January 1 deadline.

During class Mr. Ouchie told me and the rest of the class that we would be grandfathered in under the 45 classroom hour law by taking the exam in January '91 or February '91. This led me to believe that by finishing the class in December 1990 and sending in my application for the January 26, 1991 test date, that if I passed, I would be granted a license under the 45 classroom hour law.

On one of the exhibits that Mr. Howden submitted, my signature was dated 12/19/1990 which was after the December 15, 1990, deadline, but well before the January 7, 1991, postmark deadline for application to sit for the test. Based on Mr. Ouchie's remarks I had no reason to believe or even look at the application for the exam until after the class had ended, which left me after the December test date, thus under the new -- causing me to qualify under the new law (Tr., p. 29).

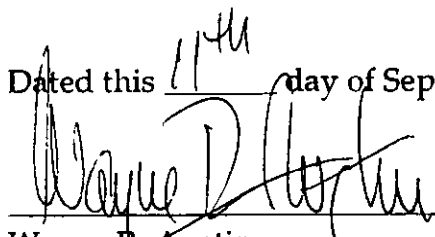
² See Page 25 of the transcript, where Mr. Clete Hansen testifies: "Students do rely on what instructors tell them and there is an assumption that students should be able to rely on what an instructor tells them. We send information to schools and we tell them that they should make sure that they and their personnel are giving correct information. Sometimes we remind schools that they must be sure that all of their personnel are giving the correct information."

Thus, while Mr. Maxey may have had constructive notice of the January 1, 1991, deadline date in time to sit for the examination administered on December 15,³ the only actual notice he had of the transition provisions was that provided by his instructor -- and that information was that he could sit for the examination in either January or February, 1991, and still qualify for licensure under the 45 classroom hour rule. Accordingly, I conclude that Mr. Maxey's reliance on his instructor's representations pertaining to the grandfathering provisions was reasonable, and that it is therefore appropriate that the January 1, 1991, procedural deadline established by the department for qualifying for licensure under the 45 classroom hour provision be extended in the case of Mr. Maxey to January 26, 1991, the date upon which he sat for and passed the licensing examination.

In summary, I find that there is no legal impediment to a modification by the department of the application procedures established to accomplish the transition from the 45 classroom hour requirement of Wis. Stats. sec. 452.09(4) to the 72 hour requirement of Wis. Stats. sec. 452.09(2)(a); that the department's action in permitting applicant to become licensed following acquisition of additional educational hours without reexamination establishes a precedent for modifying the application procedures to accomodate applicant's unique circumstances; that the public health and safety would not be jeopardized by granting licensure based on applicant's current qualifications; and that the equities of the situation militate for grant of immediate licensure.

³ If the application deadline for the January 26, 1991, examination was January 7, and if the deadline for the December 15, 1990, examination was also 19 days prior to the examination, then applicant would have had to receive the examination application prior to November 19, 1991, in order for him to have received timely notice of the January 1 transition deadline. The record does not disclose whether the examination application was received by Mr. Maxey in time to permit him to sit for the December 15, examination, and to thereby avoid that deadline.

Dated this 11th day of September, 1991.


Wayne R. Austin
Administrative Law Judge

NOTICE OF APPEAL INFORMATION

**(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)**

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Department of Regulation and Licensing.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Department of Regulation and Licensing

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Department of Regulation and Licensing.

The date of mailing of this decision is September 24, 1991.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employee trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions

for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.